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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EARL EUGENE CANNEDY, JR., Defendant and Appellant.	E040379 (Super.Ct.No. INF046350) OPINION
In re EARL EUGENE CANNEDY, JR., on Habeas Corpus.	E042488 (Super.Ct.No. INF046350

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge. Affirmed.

ORIGINAL PROCEEDING; Petition for writ of habeas corpus. James S. Hawkins, Judge. Petition denied.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia, Supervising Deputy Attorney General, and Janelle Marie Boustany, Deputy Attorney General, for Plaintiff and Respondent.

Following a jury trial, defendant Earl Eugene Cannedy, Jr., was found guilty of three counts of lewd acts upon a child (Pen. Code, § 288, subd. (a)[1]) and one count of dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)). The jury also found true the special allegation in connection with counts 2 and 3, that defendant had substantial sexual conduct with the victim within the meaning of section 1203.066, subdivision (a)(8). He was sentenced to state prison for a total term of 10 years eight months.[2] Defendant appeals, contending (1) the trial court abused its discretion in admitting evidence of his prior sexual activity under Evidence Code section 1108; (2) his counsel was ineffective; and (3) the cumulative error doctrine applies. We find each of these contentions without merit.

Defendant also petitions this court for a writ of habeas corpus. He seeks to reverse the judgment on the grounds his trial counsel rendered ineffective assistance. We find defendant's writ petition without merit. Accordingly, we affirm the judgment.

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[1] All further references are to the Penal Code unless otherwise indicated.

[2] The trial court did not impose the upper term.

[footnote continued on next page]

I. FACTS

The victim's mother and defendant began dating when the victim (born in 1990) was seven or eight years old. They married when the victim was 10 or 11. Defendant was a father figure in the victim's life.[3] According to the victim, defendant molested her in late 2003 when she was in the eighth grade. She was living in Palm Desert with defendant, her mother, and two younger sisters. Defendant's son would visit every other weekend.

The first incident occurred in November 2003 when defendant licked the victim's lips with his tongue. This made her feel uncomfortable. The second incident occurred on a Sunday night in early December. The victim's mother was at work. The victim was watching a movie with defendant when he offered to give her a foot massage. His hands moved up to her vagina. He moved his fingers so that he was touching the inside of her vagina. Afterwards she went straight to her room. Because the victim was scared, she said nothing to her mother about the incident. She was "really upset" and cried for a while before she went to sleep.

Two weeks later, defendant offered to give the victim a back massage. She was sick at the time and her lower back was hurting her. She was on the couch watching television. Defendant started touching her; he pulled her pants down and lifted up her hips. He touched her vagina with his mouth. He also used his hands to touch her vagina

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[footnote continued from previous page]

[3] At the time of trial, defendant was 46 years old.

and buttocks. She cried. Defendant said he was sorry and that it would never happen again. He said he was "caught up in the moment." After the victim's mother came home, they wrapped Christmas presents. The victim was too stunned to say anything to her mother.

The next molestation occurred on Christmas Day or the day after, when the victim was on her parents' bed and her mother was in the shower. Defendant put his hand into the victim's pants; however, he did not actually touch her vagina.

The first person the victim spoke to about the incidents with defendant was her boyfriend. After the first incident, she told him that defendant had gone up her pants and touched her. After the third incident, she told her cousin's cousin, her best friend, her best friend's mother, and then her own mother.[4] The victim's mother was shocked.

After the disclosures, defendant told the victim "we should just keep it in the family," and it was "all over" and would "never happen again." He told her to forget about it and not tell anyone that it happened. He also said that if the police questioned her, she was not to tell them what had happened because, if she did, she and her sisters would be taken away and put into a foster home.

The victim's aunt, who was 21 years old at the time of trial, testified that defendant had molested her in December 2000 when she had just turned 17 years of age. She was in the 11th grade and spending Christmas break with her sister (the victim's mother) and defendant. The aunt and defendant consumed vodka together on December

[4] These witnesses testified that the victim had told them about the incidents.

23, 2000. He was teaching her how to "guzzle." She lost consciousness at one point, and when she regained it, she was in a room with defendant. She was wearing pajamas and no underwear. Defendant told her he "liked pussy." He later got a sex toy, a rubber penis, and wet his fingers. He placed his wet fingers on her vagina and tried to put the rubber penis "into [her] lower body." Feeling the effects of the alcohol, she was "paralyzed." Defendant told her she had a "nice vagina." She was unable to recall telling the police that defendant licked her vagina.

When the victim's mother came into the room, defendant stopped what he was doing to the aunt. The victim's mother was yelling to the aunt, "'How could you do this to my family[?]'" Crying, the victim's mother called her older sister and told her that defendant was giving the aunt oral sex. The aunt's sister recalled hearing the victim's mother say that defendant was "eating out [the aunt]."

Defendant testified in his own defense. He had been married to the victim's mother since 1999 and he had worked as a locomotive engineer for Amtrak for 27 years. He described his family as "really good." He felt as though the victim was one of his own children. He believed the victim loved him like a father and called him "Daddy." However, he described some animosity in the victim because they were planning to move and she did not want to move.

Defendant denied kissing the victim on the lips, giving her a massage, or molesting her. When the victim's mother confronted him with the allegations of molestation, defendant claimed to have denied them. He also denied telling the victim

not to cooperate with the police. He further claimed that none of the sexual incidents described by the aunt happened.

II. ADMISSION OF PRIOR UNCHARGED SEXUAL ACTIVITY

On April 18, 2005, a pretrial hearing was held to determine whether the cases involving the victim and her aunt would be consolidated and, if so, whether the jury would be instructed with CALJIC No. 2.50.01. After the court indicated that it would not give the instruction if the cases were consolidated, the prosecutor chose not to consolidate, and to seek the admission of the evidence involving the victim's aunt under Evidence Code section 1108. Defense counsel opposed the admission of such evidence on the grounds that there were insufficient similarities. Specifically, he argued there was a huge difference in "a minor child who is around the age of 16, close to 17 years of age, and a minor child who is 13 years of age." He further argued that the incidents involved "separate offenses," and "The only thing that really holds them together are [*sic*] that they're both sex offenses. So under [Evidence Code section] 352 we're dealing with sex offenses anyway, which are very highly emotional, highly prejudicial against the defendant. Whether it's unduly prejudicial is really a judgment call for this Court, but I would submit that . . . it's really a borderline case."

The prosecutor responded: "[E]ven [if] we assume that everything [defense counsel] said as far as similarities, as far as it goes, under [Evidence Code section] 1108, that's more than enough for introduction of that evidence, under that evidence, under this Evidence Code. I disagree with [defense counsel]. I don't see a huge difference between a 13-year-old and a 16-year-old. We're talking about two children, one of whom is a

minor, the other's a child under the Penal Code, but still both of them are teenagers. [¶] In both situations the conduct involved oral copulation . . . . Both of these teenagers were related to the defendant's wife, although not related to the defendant. And in both instances the sexual misconduct occurred in the defendant's home. [¶] I think there are substantial similarities between what the defendant did with regard to [the victim] and also with regard to [her aunt], which is really not . . . required under [Evidence Code section] 1108 as it is under [Evidence Code section] 1101[subdivision] (b), but there is substantial similarity, and I think the Court should admit it under that Evidence Code Section, under 352. We're not talking about an incident that occurred so far apart, we're talking about within a couple of years of each other. The allegations involving [the victim's aunt] are not more egregious than they are involving [the victim]. I don't think it's going to take more than a couple of hours, maybe three hours' worth of testimony, if that, for the purpose of introducing the conduct related to [the victim's aunt]. [¶] For those reasons I don't think under [Evidence Code section] 352 the Court should exclude it. And the question is whether or not the evidence has a tendency to be more prejudicial than it is probative, and I don't think it is in this case."

The trial court found the evidence admissible under Evidence Code section 1108. Evidence that defendant committed prior sex crimes is admissible under Evidence Code section 1108 to prove his propensity to commit such crimes, subject to the limitations set out in Evidence Code section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

On appeal, defendant contends the trial court erred in admitting the evidence of the sexual activity he had with the victim's aunt (his wife's then 17-year-old sister). He

argues the trial court failed to undertake the balancing analysis set forth in Evidence Code section 352, or, in the alternative, the court abused its discretion in admitting the evidence because its prejudicial effect outweighed its probative value.

Regarding the first issue, respondent points out that the record shows that the court carefully considered whether to allow the jury to hear the challenged evidence, and it mentioned Evidence Code section 352, which shows that it was aware of it. Also, both the defense counsel and the prosecutor referred to the section in their argument. Thus, we agree with respondent's claim that "it cannot be said the trial court was unaware of its duty under Evidence Code section 352." Moreover, defendant's claim that the trial court did not engage in the required weighing process is without merit. "[A]lthough the record must affirmatively show that the trial court weighed prejudice against probative value . . . [citations], the trial judge 'need not expressly weigh prejudice against probative value -- or even expressly state that he has done so [citation.].' [Citations.] Thus, . . . we are willing to infer an implicit weighing by the trial court on the basis of record indications well short of an express statement. Several of the cases . . . involved argument of counsel or comments by the trial court, or both, touching on the issues of prejudice and probative value from which we might infer that the court was aware of the Evidence Code section 352 issue and thus of its duty to weigh probative value against prejudice. [Citations.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 924, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Notwithstanding the above, defendant argues that the trial court abused its discretion in admitting the evidence. We disagree. The trial court enjoys broad

discretion in conducting its balancing under Evidence Code section 352, and we reverse the court's admissibility ruling only if the exercise of discretion was "'arbitrary, whimsical, or capricious as a matter of law. [Citation.]' [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

To be admissible under Evidence Code section 1108, a prior sex offense need not be so similar as to give rise to an inference of a noncharacter purpose under Evidence Code section 1101. (*People v. Soto* (1998) 64 Cal.App.4th 966, 983-984.) As the court explained in *Soto*, "[Evidence Code] [s]ection 1108 does not require '"more exacting requirements of similarity between the charged offense and the defendant's other offenses . . . ."' [Citation.] Such a requirement was not added to the statute because ['"]doing so would tend to reintroduce the excessive requirements of specific similarity under prior law which [Evidence Code section 1108] is designed to overcome, . . . and could often prevent the admission and consideration of evidence of other sexual offenses in circumstances where it is rationally probative. Many sex offenders are not ['']specialists,['] and commit a variety of offenses which differ in specific character."' [Citation.]" (*Id*. at p. 984.) "The charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41.)

Here, we conclude that the offense against the victim's aunt was sufficiently similar to the charged offenses. Defendant's sexual activity involved two minor girls, both of whom were related to him through his wife. The type of sexual activity was

similar and occurred in defendant's house. While defendant's conduct was not identical in each instance, his behavior proves a similar pattern of conduct, a desire to perform oral sex on his victims. Any dissimilarity between the sexual assault on the victim's aunt and the charged acts on the victim went to the weight, not the admissibility, of the testimony of the victim's aunt. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 660.)

Additionally, there was very little possibility of confusion of the issues. The court explained to the jury that the prior sexual assault evidence related to a prior incident. The court also instructed the jury pursuant to CALJIC Nos. 2.50.01 [Evidence of Other Sexual Offenses] and 2.50.1 [Evidence of Other Crimes by the Defendant Proved by a Preponderance of the Evidence] on the limited use of the prior sexual offense. Although defendant argues that the evidence was prejudicial, clearly any evidence that supports a finding of guilt is prejudicial. Nonetheless, the probative nature of the evidence outweighed its prejudicial effect such that admission was proper.

We thus conclude the trial court did not abuse its discretion in admitting evidence of defendant's prior sexual conduct under Evidence Code section 1108.

Even if we assume, for the sake of argument, the trial court erred in admitting the uncharged prior acts involving the victim's aunt, such error was harmless in light of the evidence supporting defendant's convictions. Furthermore, defendant had the opportunity to cross-examine the victim and her aunt and argue they were not credible witnesses. Defendant also had the opportunity to cross-examine the witnesses whom the victim informed about the sexual abuse. It is thus not reasonably probable that the jury would have reached a more favorable verdict even in the absence of the evidence.

(*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Carter* (2005) 36 Cal.4th 1114, 1152 [erroneous admission of evidence of uncharged misconduct is not reversible "unless it is reasonably probable the outcome would have been more favorable to defendant had such evidence been excluded"].)

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends his defense attorney rendered ineffective assistance of counsel (1) by failing to introduce into evidence the victim's medical records in response to her statements to the hospital staff that she had not been sexually active, and (2) by failing to request that the jury be instructed that the victim's statements to others regarding defendant's actions were admitted for the limited purpose of showing that a complaint was made by her, and not for the truth of the matter.

To prevail on a claim of ineffective assistance of counsel, a defendant must show by a preponderance of the evidence that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance resulted in prejudice to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *In re Neely* (1993) 6 Cal.4th 901, 908.) Prejudice is shown if there is a reasonable probability the defendant would have realized a more favorable result but for counsel's deficient performance. (*In re Neely*, *supra*, at pp. 908-909.)

A. Evidence of the Victim's Medical Records

The victim claimed to the medical staff that she was not sexually active. Defendant contends the medical records showed that the victim was sexually active with

someone other than defendant. Thus, Defendant argues that his counsel should have impeached her credibility with such evidence.

This issue was raised in a motion for new trial brought by substitute counsel, who stated, "The prosecution never introduced any medical records. However, the medical records clearly showed that [the victim] lied about her motives for accusing [defendant] of molesting her. The medical records show that [the victim] had been sexually active with someone other than [defendant]. The medical records show that [the victim] accused [defendant] of molesting her to account for her sexually promiscuous behavior." More specifically, counsel claimed that the medical records showed that the victim had symptoms of early condyloma, commonly called genital warts. Thus, substitute counsel argued that the medical records were relevant to show that the victim could *not* have contracted this sexually transmitted disease (STD) from defendant as she claimed, and that she lied to the medical staff about defendant to cover up her sexual activity with others. Respondent argues that the evidence was inadmissible. We agree with respondent.

In enacting Evidence Code section 1103, subdivision (c), the Legislature acknowledged that the alleged victim's consensual sexual conduct is irrelevant to establish consent in a particular instance. (See *People v. Chandler* (1997) 56 Cal.App.4th 703, 707 (*Chandler*).) "Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261, 262, or 264.1 of the Penal Code, or under Section 286, 288a, or 289 of the Penal Code, . . . reputation evidence, and evidence of specific instances of the complaining witness'

sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness." (Evid. Code, § 1103, subd. (c)(1).)

Such evidence, however, is admissible to attack the victim's credibility as stated under Evidence Code section 782. (Evid. Code, § 1103, subd. (c)(5).) Evidence Code section 782 sets forth the required procedures for submitting evidence of the victim's sexual conduct. The statute requires a written motion explaining the relevancy of the evidence in attacking the victim's credibility. (Evid. Code, § 782, subd. (a)(1).) The motion must be filed under seal and be accompanied by an affidavit supporting the offer of proof. (Evid. Code, § 782, subd. (a)(2).) If the court finds the offer of proof sufficient, it will hold a hearing out of the jury's presence to determine the admissibility of the proffered evidence. (Evid. Code, § 782, subd. (a)(3).)

In practice, the application of the credibility exception under Evidence Code section 782 has been limited. "By narrowly exercising the discretion conferred upon the trial court in this screening process, California courts have not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to limit public exposure of the victim's prior sexual history. [Citations.] Thus, the credibility exception has been utilized sparingly, most often in cases where the victim's prior sexual history is one of prostitution. [Citations.] Evidence the victim participated in a form of prostitution is conduct involving moral turpitude which is admissible for impeachment purposes. [Citation.]" (*Chandler*, *supra*, 56 Cal.App.4th at p. 708.)

In the instant case, we conclude that defendant's trial counsel was not ineffective for failing to seek the admission of the victim's medical records. First, the fact that the

victim may have had an STD was irrelevant to the charges before the jury. There was no allegation that defendant engaged in sexual intercourse with the victim who was a virgin child or that he gave her an STD. Instead, the claims were limited to fondling and oral copulation.[5] Second, the jury was aware that the victim had a boyfriend. Thus, her credibility would not have been diminished by the knowledge that she had engaged in consensual sexual activity with her boyfriend, i.e., someone other than defendant. And finally, even if defense had sought to admit the evidence, under Evidence Code section 352, the court could have reasonably found that its potential for prejudice far outweighed any probative value. Evidence of a victim's sexual experience generally is inadmissible and highly prejudicial, in that, it tends to deprecate the victim's character. "Great care must be taken to insure that this exception to the general rule barring evidence of a complaining witness' prior sexual conduct, i.e., Evidence Code section 1103, subdivision (b)(1), does not impermissibly encroach upon the rule itself and become a 'back door' for admitting otherwise inadmissible evidence." (*People v. Rioz* (1984) 161 Cal.App.3d 905, 918-919.)

For the above reasons, we cannot say that defense counsel rendered ineffective assistance of counsel by not attempting to introduce the victim's medical records into evidence.

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[5] Defendant acknowledges that Dr. Charles F. Dubin would have testified that the victim could not have contracted her STD by somebody merely touching the vaginal area with a finger and "it is extremely unlikely to be contracted by oral contact."

B. Instruction Re: Admission of the Victim's Statements to Others.

Next, defendant claims that his counsel was ineffective for failing to request an instruction that the victim's statements to others that defendant molested her were admitted for the limited purpose of showing that a complaint was made by her, and not for the truth of the matter stated. Respondent disagrees, contending such instruction would have conflicted with another instruction given to the jury.

The victim's statements to others were admissible under the fresh-complaint doctrine, which allows evidence to be admitted for the limited purpose of showing that a complaint was made by the victim, and not for the truth of the matter stated. (*People v. Brown* (1994) 8 Cal.4th 746, 760-761.) Evidence admitted pursuant to this doctrine may be considered by the trier of fact for the purpose of corroborating the victim's testimony, but not to prove the occurrence of the crime. (*People v. Bernstein* (1959) 171 Cal.App.2d 279, 285.)

Here, the jury received CALJIC No. 2.13 which, in relevant part, provides: "Evidence that at some other time a witness made statements that are inconsistent or consistent with their testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on that former occasion." The victim's statements were properly admitted as fresh complaints, i.e., to establish that the victim had made a complaint about defendant's actions. Even though the statements could not be admitted for their truth under this doctrine, the fact that the victim complained about defendant's actions soon after their occurrences served to bolster her credibility. Respondent

contends that to tell the jury that the victim's statements to others could not be used to test her credibility would have conflicted with CALJIC No. 2.13. We disagree. Clearly, the statements could not be used as evidence of the truth of the facts. Thus, defense counsel should have requested an instruction on how to view the victim's statements, or sought a modification of CALJIC No. 2.13.

Having agreed with defendant's claim that there was no tactical reason for his counsel not to request a jury instruction regarding the victim's statements, we consider whether defendant has demonstrated a reasonable probability the outcome of his trial would have been different absent that error. (*In re Neely*, *supra*, 6 Cal.4th at pp. 908-909.) Under the facts of this case, while additional instruction on how to view the victim's statements may have had some marginal benefit to the defense, a review of the evidence of defendant's guilt leaves us convinced his counsel's failure to request such further instruction did not adversely affect the outcome of his trial. (*People v. Dickey* (2005) 35 Cal.4th 884, 907.)

In sum, on this record defendant has failed to carry his burden to demonstrate prejudice as a result of the ineffective assistance of his counsel.

IV. CUMULATIVE ERROR DOCTRINE

Defendant contends that various errors are, taken together, prejudicial and require reversal. Having found no individual prejudicial error, we also conclude there is no cumulative prejudice. (*People v. Cook* (2006) 39 Cal.4th 566, 608.)

V. PETITION FOR WRIT OF HABEAS CORPUS

Recognizing that the proper method to raise an ineffective assistance of counsel claim is by petition for writ of habeas corpus, not appeal, defendant has filed a separate petition for writ of habeas corpus in which he claims that his trial counsel rendered ineffective assistance by (1) failing to introduce the victim's medical records; (2) failing to request a limiting instruction; (3) failing to present evidence that two witnesses had motives to give false testimony; and (4) failing to interview a witness regarding the victim's statement on the internet that she made up the claims of molestation. Defendant seeks an evidentiary hearing, if necessary, to evaluate these issues.

In the petition, two of defendant's claims of ineffective assistance of counsel were raised in his appeal. Regarding those claims, defendant has not offered any evidence outside the record to support a finding of ineffective assistance. As such, we conclude the representation by defendant's attorney was not unreasonably deficient and, even if it was, it is not reasonably probable the result would have been any different.

In his third claim of ineffective assistance, defendant contends his counsel failed to present evidence that two witnesses had motives to give false testimony. According to defendant, both the victim's mother's older sister (C.) and the victim's best friend's mother (M.) had motives for lying. Defendant argues that C. hated him and the victim's mother as evidenced by her lawsuit against them to recover a $2,285 loan to them, and by hiring defendant's divorce attorney to represent her in the small claims proceedings. He further claims that C. told defendant's employer about his criminal charges. As for M., defendant pointed out her interview with the sheriff's investigator in January 2004, when

she admitted that she and defendant did not like each other. Defendant references his motion for new trial in support of these claims.

Respondent argues that even if the above is true, the evidence was "too tangential to warrant consideration as evidence of impeachment." We agree. Evidence Code section 352 provides the trial court with the power to prevent criminal trials from "'degenerating into nitpicking wars of attrition over collateral credibility issues.'" (*People v. Ayala* (2000) 23 Cal.4th 225, 301.) Here, defendant's trial counsel had already cross-examined C. regarding her bias. He questioned C. regarding her feelings after the incident involving the defendant and the victim's aunt specifically asking, "Were you angry at [defendant]?" C. replied, "Yes." He further pointed out that C. loaned defendant and the victim's mother money shortly thereafter, and that she did not report the incident until May 30, 2001.

"Reviewing courts will sustain ineffective assistance of counsel claims on appeal '". . . only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." [Citation.]'" (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 255, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 980.) Here, defendant's trial counsel could have chosen not to emphasize a significant bias against defendant because it could be easily refuted. Clearly, if C. was so biased against defendant, she would never have loaned the money to him and the victim's mother, nor would she have waited until May 30, 2001, to report the incident involving the victim's aunt to the police.

Regarding M., her bias was merely a collateral matter that is not material because it cannot reasonably affect the outcome of a case. The jury had already heard from the victim about what defendant had done to her. The fact that she told her best friend's mother who then testified to what she was told is irrelevant.

Accordingly, as to defendant's third claim of ineffective assistance, we find that he cannot show either deficient representation or prejudice.

Defendant contends that his trial counsel should have interviewed J., a friend of the victim, who would have testified about the victim's statements on a profile on the Internet. According to defendant, J. stated: "The second week of February, I logged on the internet to talk to my friends. That day, I was talking to [the victim], and I decided to look at her profile. To my surprize [*sic*] the profile said, '"To everyone whos [*sic*] reading this, the rumers [*sic*] that you've heard are wrong. I just wanted to move to my dads [*sic*] because everyone hates me, and I don[']t want to put up with it anymore. Everything you've heard isn[']t true. I just made it up, so I could get away from it all."'" Defendant argues that because his counsel did not know of J., his "investigation was at very best superficial, if that."

As respondent points out, there is no allegation that trial counsel knew of the existence of J., the information on the Internet, or the time frame given for the alleged Internet information, and there is no documentary evidence. Thus, this claim is too vague to warrant habeas relief. Moreover, the claim that the victim wanted to move away because everyone hates her contradicts defendant's trial testimony. According to defendant, the victim "showed a little animosity because we had put the house up for

sale. We were going to move up to Mountain Center to 22 acres of land, and I don't think she liked that too much." Accordingly, we find that defendant cannot show either deficient representation or prejudice with regards to his fourth claim of ineffective assistance.

Finally, defendant contends the cumulative effect of his counsel's "deficient performances caused a miscarriage of justice and denied [him] his rights to due process" under our state and federal Constitutions. Having found no individual deficient performance that caused a miscarriage of justice, we also conclude there is no cumulative prejudice. (*People v. Cook*, *supra*, 39 Cal.4th at p. 608.)

VI. DISPOSITION

The judgment is affirmed and the petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

GAUT
J.